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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 362

GRAHAME THOMAS SMALLWOOD, JR., ELIZABETH S. WIER, and ELEANOR BEASLEY NIEBELL, *Petitioners,*

v.

VIOLA A. HODSON, and MARGARET HYNSON STUDT, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARTHUR J. HILLAND
902 Shoreham Building
Washington 5, D. C.

PAUL M. NIEBELL
1201 Nineteenth Street, N.W.
Washington 6, D. C.
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered on May 29, 1957, in the consolidated cases herein involved. (Consolidated Cases Nos. 13,201 and 13,202, United States Court of Appeals for the District of Columbia Circuit.)

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported (R. 77-78). A copy thereof is hereto appended.

The opinion of the United States District Court for the District of Columbia on the question presented appears on pages 29-31 and 67 of the record.

JURISDICTION.

The judgments of the United States Court of Appeals for the District of Columbia Circuit were entered on May 29, 1957 (R. 79). A motion for rehearing was denied on July 2, 1957 (R. 95). The jurisdiction of this Court is involved under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED.

Are hospital records containing factual statements of the history of a patient's illness which were made at the hospital in the regular course of the business of the hospital by a member of the hospital staff at the time of admission of a patient from information furnished in part by the patient and in part by the Respondent Hodson for use by the hospital staff, admissible evidence under the Federal Shopbook Statute?

The United States District Court ruled that the hospital records were inadmissible and said (R. 29-30):

> "The Court. * * * You know, there are divergent rulings in different circuits on the Federal Shopbook Rule. The Second Circuit has a much more liberal interpretation of the Federal Shopbook Rule than this circuit has. I think in the Second Circuit this would be admissible. But in New York Life Insurance Company versus Taylor, and in a subsequent case of United States against Clainos, our Court of Appeals has limited the Federal Shopbook Rule to routine clerical entries. A statement of what somebody tells the

person who keeps the record, except for purely routine facts, is not, in my opinion, within the Court of Appeals opinions."

See also Record, page 67.

The Court of Appeals affirmed the United States District Court; its opinion is entirely silent concerning the admissibility of the hospital record of the statements made by the testatrix herself, and its opinion stated, for reasons which have no factual foundation in the record, that it was unnecessary for that court to decide the admissibility of the hospital record of statements made by the Respondent Hodson (R. 77-78).

Petitioners contend that the decision of the United States District Court, which was based upon the prior decisions of the Court of Appeals in *New York Life Ins. Co.* v. *Taylor*, 79 U.S. App. D.C. 66, 147 F. 2d 297, and *Clainos* v. *United States*, 82 U.S. App. D.C. 278, 163 F. 2d 593, is in conflict with the decision of this Court in *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (rehearing denied, 318 U.S. 800, 63 S. Ct. 757, 87 L. Ed. 1163), where this Court construed the Federal Shopbook Statute.

Petitioners also contend that there is a clear conflict between the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York Life Ins. Co.* v. *Taylor, supra,* which was followed and applied by the United States District Court in these cases, and the decisions of the Second, Third and Eighth Circuit Courts of Appeal on this question in *Ulm* v. *Moore-McCormick Lines, Inc.*, CCA (2d Cir.) NY 1940, 115 F. 2d 492 (certiorari denied 313 U.S. 567, 85 L. Ed. 1525), *Reed* v. *Order of*

United Commercial Travelers of America, (2d Cir.) CCA NY 1941, 123 F. 2d 252; *Pollack* v. *Metropolitan Life Ins. Co.,* CCA (3d Cir.) NJ 1943, 138 F. 2d 123; *Tucker* v. *Loew's Theatre & Realty Corp.,* CCA (2d Cir.) NY 1945, 149 F. 2d 677; *Woodward* v. *United States,* CCA (8th Cir.) Mo. 1950, 185 F. 2d 134, (reversed on other grounds, 314 U.S. 112, 95 L. Ed. 670).

From the foregoing it appears that a substantial question of evidence of great importance and of almost daily application in the Federal courts in all classes of cases and which arises out of the construction of a Federal statute is involved.

STATUTE INVOLVED.

United States Code Annotated, Title 28, Section 1732, pages 473-474, formerly Title 28, Section 695:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind. June 25, 1948, c. 646, 62 Stat. 945."

STATEMENT OF THE CASE.

The question presented arose in the trial of two cases which were consolidated for a joint trial in the District Court (R. 6 and 14) and were consolidated for a joint appeal in the Court of Appeals (R. 79). One of the cases was an action in the nature of an equity proceeding, to set aside a deed from Dorothy Smallwood Geare, deceased, to the Respondent Hodson (R. 2-5); the other was a contest of a will purporting to be the last will and testament of Dorothy Smallwood Geare, deceased (R. 10-14).

Parties.

Petitioners are the nephew and nieces and the only heirs at law and next of kin of Dorothy Smallwood Geare, deceased, who died on December 28, 1954. In the District Court they were the plaintiffs in the action to set aside the deed, and in the will contest.

Respondent Hodson is the sole grantee in the deed dated February 2, 1954, and recorded April 14, 1954, whereby the Decedent Geare conveyed to her without any consideration a valuable piece of real estate in the District of Columbia, improved by a house, which was furnished and bringing in rent of $156 per month. She was the sole defendant named in the petitioners' complaint to set aside the deed. Respondent Hodson is also the executrix and principal beneficiary of a paper writing dated February 2, 1954, purporting to be the last will and testament of Dorothy Smallwood

Geare, deceased, and was the defendant in the will contest.

Respondent Studt is the grantee in a deed from the Respondent Hodson whereby the Respondent Hodson conveyed to the Respondent Studt an undivided one-half interest in the real estate conveyed by the Decedent Geare to the Respondent Hodson. That deed was recorded after the filing of the petitioners' action to set aside the deed from the Decedent Geare to the Respondent Hodson. Respondent Studt was granted leave to intervene as a defendant in the petitioners' action to set aside the deed from the Decedent Geare to the Respondent Hodson. Respondent Studt is also a beneficiary of the paper writing purporting to be the last will and testament of Dorothy Smallwood Geare, deceased.

The Issues.

Among the issues which were common to these consolidated cases were the issues (1) of Dorothy Smallwood Geare's mental capacity to make the deed and will involved, (2) whether the deed and will were obtained, or the execution of them, procured from her by the fraud, deceit, undue influence, duress or coercion of the Respondent Hodson, and (3) whether a confidential relationship existed between Respondent Hodson and the Decedent Geare (R. 3, 13-14).

The hospital record of the factual statements of the history of her illness made by the testatrix herself was relevant to these issues. The hospital record which was on the usual and customary printed form entitled "Clinical Record" was dated April 30, 1954, the date on which the Decedent Geare was admitted to Saint Elizabeth's Hospital, and when the printed form was

filled out, it became a part of the records of Saint Elizabeth's Hospital. The hospital record, if admitted in evidence, would have shown the following (R. 67-68):

> "Patient is direct admission to hospital. She states she was taken from her home, where she lived alone, and brought here. Does not know why. She doesn't realize she is sick. She states she has been working in a store. She knew her husband died 30 years ago. She has no children, but some nieces and nephews. She is quite cooperative, pleasant, answers questions readily. At times she is incoherent. Shows gross memory defects, and is disoriented."

This hospital record, if admitted in evidence, would have shown that at a time near the making of the will and deed, Mrs. Geare did not know, as shown by other evidence, that she had been taken from Emergency Hospital, and not from her home, to Saint Elizabeth's Hospital, did not know that she lived with many people and not alone, did not know why she was taken to Saint Elizabeth's Hospital, did not realize she was sick, thought that she had been working in a store when as a matter of fact, she had worked for the Federal Government in a clerical capacity and had been retired on account of her illness, all of which was shown by other evidence (R. 23-25, 28, 70).

The hospital record of the factual statements of the history of the Decedent Geare's illness made by the Respondent Hodson, if admitted in evidence, would have shown the following (R. 28, 31-33):

On May 6, 1954, six days after the admission of Decedent Geare to St. Elizabeth's Hospital, Respondent Hodson was interviewed at the hospital by a hospital doctor, and the doctor filled out the usual

and customary printed form entitled "Clinical Record," which became a part of the hospital records, on which it is stated that Respondent Hodson was the Informant, and gave the following factual information relating to the mental condition of the patient (R. 32-33):

"Present Illness:

"Beginning about January of 1953, the patient began to lose weight. She went from 138 lbs. in January 1953 to 96 lbs. in December of 1953. Beginning in the winter of 1953, she was very fatigued. She would spend the whole weekend in bed. In the summer of 1953 she became too exhausted to go to work. Her appetite had been poor all of 1953. She needed more sleep than usual, although during the winter of 1953 she would get up sometimes at night, being unable to sleep. In September of 1953, the patient had an episode that was possibly a nonparalytic cerebrovascular accident in which her hands suddenly went cold and limp. During the early months of 1954, the patient seemed to be going more and more into a stupor. She had several heart attacks during March and April after the stuporous condition had begun. During March she did not recognize her old home that she lived in quite awhile. During the past six weeks (March and April), the patient had stopped reading. There is a possibility that she had visual hallucinations. She would greet people who were not there. It is also possible that when she went to Emergency Hospital on February 18, she may have had auditory hallucinations, for then the informant heard the patient say, 'My stomach says, "What do you know about that?"' Also, the patient apparently had delusions of location, thinking that she was in San Francisco. Apparently, she went to Emergency Hospital because of a severe heart

attack on April 17, going to Emergency Hospital on the 18th. At that hospital she got out of bed and began to pull the clothes off other patients. It was then that they asked that she be removed from the hospital. Hence, on the 30th, she was brought to Saint Elizabeth's Hospital."

This evidence was offered in the District Court under the provisions of the Federal Shopbook Statute to show that the mental incapacity of the Decedent Geare had existed, according to Respondent Hodson's own statements, before and at the time of the execution of the deed and will in question on February 2, 1954 (R. 28-30, 35, 65-67).

The District Court excluded the hospital records under the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York Life Ins. Co.* v. *Taylor, supra,* after calling attention to the conflict between the decision in that case and the decisions of the Court of Appeals of the Second Circuit, as hereinbefore shown and as will more fully appear from a reading of the record (R. 29-31 and 67). The District Court then indicated that counsel for the petitioners could put leading questions based on the hospital record to the Respondent Hodson (R. 29-31). Thereupon, counsel for petitioners attempted to elicit testimony from Respondent Hodson on the matters recited in the hospital record of her factual statements of the history of the Decedent Geare's illness. When counsel for petitioners attempted to insist upon an answer, other than "I don't remember" or "I told you I don't remember," the following occurred (R. 31):

"The Court. If she says she does not remember, then she can neither affirm nor deny."

The net result of this cross-examination of the Respondent Hodson was that she made no assertion concerning the statements attributed to her by the hospital records; she made no assertion that could be contradicted for the purpose of impeachment or any other purpose by any other witness.

Without the evidence contained in the hospital records of statements made by the testatrix herself and of statements made by the Respondent Hodson showing the Decedent Geare's mental incapacity at a time near the making of the deed and will involved, the petitioners' case was greatly prejudiced, and the jury found in favor of the respondents. The District Court then dismissed the deed case, taking the verdict of the jury in the will case as advisory in the deed case. Petitioners appealed both cases to the United States Court of Appeals for the District of Columbia Circuit (R. 9, 19).

Without deciding the substantial questions raised by the petitioners, the Court of Appeals affirmed the judgments of the District Court (R. 77-79). The opinion of the Court of Appeals is entirely silent concerning the admissibility of the hospital record of the statements made by the testatrix herself, and its opinion stated, for reasons which have no factual foundation in the record, that it was unnecessary for it to decide the admissibility of the hospital record of statements made by the Respondent Hodson. The reasons stated by the Court of Appeals, which have no factual foundation in the record, were as follows (R. 78):

> "* * * the exclusion of a hospital record containing a statement as to the decedent's physical and mental condition in 1953 and early months of

1954, indicated by the hospital record as having been made orally to a hospital doctor by Mrs. Hodson, was not in our view prejudicial. Mrs. Hodson was called as an adverse witness by appellants, and an effort could have been made to elicit testimony from her on all of the matters recited in her purported statement; if her testimony was inconsistent with the statement, appropriate steps could have been taken to attempt to discredit her, as by calling the doctor. This was not done. In the circumstances, the exclusion of the affidavits and the hospital record, even if erroneous—points which we do not find it necessary to decide—does not appear to be 'inconsistent with substantial justice.' See Rule 61, Fed. R. Civ. P. Reversal for a new trial is not warranted in either case because of the exclusion of this evidence."

The Court of Appeals evidently did not carefully review the record of these cases. The fact of the matter is that an effort was made to elicit testimony from Respondent Hodson on the matters recited in the hospital record of her statements, and her answers were, "I don't remember" or "I told you I don't remember," as hereinbefore shown (R. 31). She made no assertion that could have been discredited by calling the doctor or any other witness. No contradiction can be involved where there has been no assertion. See III Wigmore on Evidence, Third Edition, Section 1038, pages 723-724. Moreover, as pointed out by Associate Justice Edgerton, now Chief Judge Edgerton, in his strong dissenting opinions in *New York Life Ins. Co.* v. *Taylor*, 79 U.S. Appeals, D.C. 66, 70 and 75-80, and 147 F. 2d 297, 301 and 306-311, the purpose of the Federal Shopbook Statute was to obviate the necessity of calling witnesses in the

category of the member of the hospital staff who took and recorded the statements of the Respondent Hodson and the Decedent Geare.

The Court of Appeals' factually incorrect statements placed counsel for petitioners in a false light. They indicate that through ignorance or neglect, counsel failed to do something that could have been done, when the truth of the matter is, as shown by the record, counsel actually did what the Court of Appeals states "could have been" done; namely, an effort to elicit testimony from Respondent Hodson on the matters recited in the hospital record of her statements (R. 31). The Court of Appeals' further statement that "if her testimony was inconsistent with the statement, appropriate steps could have been taken to attempt to discredit her, as by calling the doctor," also implies that Respondent Hodson was not interrogated on her statements shown in the hospital record, when the truth of the matter is that she was interrogated but gave no testimony inconsistent with her former statements (R. 31). When counsel for petitioners attempted to insist upon an answer, other than "I don't remember" or "I told you I don't remember," the following occurred (R. 31):

> "The Court. If she says she does not remember, then she can neither affirm nor deny."

The rulings of the District Court and the Court of Appeals frustrated the object and purpose of the Federal Shopbook Statute, and prejudiced the petitioners' case. The statute intended that the hospital record should be admissible in lieu of the testimony of the person who made the record. The rulings which excluded the hospital records highly prejudiced

the petitioners' cases because they left the petitioners in a position where the petitioners could not and did not get before the jury the statements made by the Decedent Geare and the Respondent Hodson concerning the history of the Decedent Geare's illness.

JURISDICTION OF COURTS BELOW.

The United States District Court for the District of Columbia had jurisdiction of Case No. 13,201 under Section 11-306 of the District of Columbia Code, 1951 Edition, and of Case No. 13,202 under Sections 11-503 and 19-312 of the same code.

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction of both appeals under Section 1291, Title 28, of the United States Code Annotated.

REASONS FOR GRANTING THE WRIT.

Petitioners contend that the decisions of the United States Court of Appeals for the District of Columbia Circuit upon which the judgments in these cases rest are (1) in conflict with the decision of this Court in *Palmer* v. *Hoffman, supra,* and (2) in conflict with the decisions of the Court of Appeals for the Second, Third and Eighth Circuits on the admission of hospital records or similar records under the Federal Shop-book Statute. These two points are clearly established by the dissenting opinion of Associate Justice Edgerton, now Chief Judge Edgerton, on the original hearing of *New York Life Ins. Co.* v. *Taylor, supra,* and his dissenting opinion on rehearing of the same case. See 79 U.S. App. D.C. 70, and 75-80 or 147 F. 2d 301 and 306-311. Chief Judge Edgerton's dissenting opinions show that the decision of the United States

Court of Appeals for the District of Columbia Circuit in *New York Life Ins. Co.* v. *Taylor, supra,* is in conflict with the decision of this Court in *Palmer* v. *Hoffman, supra,* and in conflict with two decisions of the Court of Appeals for the Second Circuit, and in conflict with one decision of the Court of Appeals for the Third Circuit.

In *Palmer* v. *Hoffman, supra,* this Court stated that the Statute must be liberally construed. The very purpose of the Statute was to change the old common-law rule so as to eliminate the calling of witnesses to prove records made in the regular course of a business and to obviate the difficulties of such proof and the injustices that resulted where the persons making the entries on the books were dead, beyond the jurisdiction of the Court, or otherwise unavailable. This Court said in *Palmer* v. *Hoffman, supra,* at page 115:

> "The several hundred years of history behind the Act (Wigmore, supra, 66 §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But regular course of business must find its meaning in the inherent nature of the business in question and in the method systematically employed for the conduct of the business as a business."

A reading of the two hospital records involved will disclose that they consist of factual matters relating to the Decedent Geare's mental condition under circumstances where there could be no question of their trustworthiness or reliability. The facts were recorded by a member of the hospital staff at or near

the time of the admission of the Decedent Geare to Saint Elizabeth's Hospital. They were recorded at the hospital and were the usual and customary entries recorded with respect to all patients admitted. The entries were made in the regular course of the hospital's business and clearly related to the business of the hospital and particularly to Mrs. Geare's mental condition which was one of the issues involved in the trial of these cases. The hospital records were also relevant on the issue of undue influence, fraud, deceit, duress and coercion because it is well established that on these issues, evidence of the mental condition is relevant. A person who is mentally ill is more easily susceptible to undue influence, fraud, deceit, duress and coercion.

In the Courts of Appeal of the Second, Third and Eighth Circuits, factual statements relating to the illness of a patient, taken by the hospital doctor at or about the time of the admission of the patient and other entries made in the regular course of business and relating to the conduct of such business, were held to be admissible under the Federal Shopbook Statute as construed by this Court in *Palmer* v. *Hoffman, supra.* For example, in *Ulm* v. *Moore-McCormick Lines, Inc., supra,* hospital records similar to those involved in these cases were excluded by the District Court, and counsel was told there, as here, to "subpoena the doctor" to prove the statements. The Court of Appeals of the Second Circuit reversed the case and held that the hospital records were admissible under the Federal Shopbook Statute. That Court pointed out that the most important feature of the defendant's case was an attack upon the credibility of the plaintiff, and that the hospital records were par-

ticularly relevant to that issue, and were also important as to the extent and cause of the plaintiff's injuries. That Court held that the exclusion of the hospital records by the District Court "requires a reversal of the judgment below for a new trial."

Another example is *Woodward* v. *United States, supra,* where the Court of Appeals of the Eighth Circuit said, page 137:

> "* * * After all, the purpose of rules of evidence is to get at the truth; not to suppress it. * * *"

The holding of the United States Court of Appeals for the District of Columbia Circuit in these cases was that the exclusion of the hospital records was not prejudicial error. The holding of the Court of Appeals of the Second Circuit in *Ulm* v. *Moore-McCormick Lines, Inc., supra,* and *Reed* v. *Order of United Commercial Travelers of America, supra,* was that the exclusion of such hospital records was prejudicial error. Thus, there is a sharp conflict of opinion between the decisions of the United States Court of Appeals for the District of Columbia Circuit and the decisions of another circuit court of appeals.

We believe that the exclusion of the hospital records in these cases was prejudicial error. How can any court conclude from the record that the jury would not have reached a different verdict if the jury had learned from this reliable source of evidence that at a time near the making of the will and deed, the mental condition of Mrs. Geare was as shown by the hospital record of her own statements and the hospital record of the statements of the Respondent Hodson?

We submit that in view of the conflict between the decisions of the United States Court of Appeals for the District of Columbia Circuit and the decision of this Court in *Palmer* v. *Hoffman, supra,* and in view of the fact that the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York Life Ins. Co.* v. *Taylor, supra,* was not reviewed by this Court, and in view of the conflict between the decision in that case and the decisions of the Courts of Appeal of the Second, Third and Eighth Circuits, this Court should review the judgments in these cases, resolve the conflicts, and bring the decisions of the United States Court of Appeals for the District of Columbia Circuit in line with this Court's construction of the Federal Shopbook Statute in *Palmer* v. *Hoffman, supra.*

Thus a substantial question of evidence of great importance and of almost daily application in the Federal courts in all classes of cases and which arises out of the construction of a Federal statute is involved.

CONCLUSION.

In conclusion, it is respectfully submitted that for the reasons hereinbefore shown, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR J. HILLAND
902 Shoreham Building
Washington 5, D. C.

PAUL M. NIEBELL
1201 Nineteenth Street, N.W.
Washington 6, D. C.
Attorneys for Petitioners

APPENDIX.

Court of Appeals' Opinion.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,201 and 13,202

GRAHAME THOMAS SMALLWOOD, JR., ET AL., APPELLANTS

v.

VIOLA A. HODSON, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

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Decided May 29, 1957

Mr. Arthur J. Hilland, with whom *Messrs. Paul M. Niebell* and *Thomas N. Kindness* were on the brief, for appellants.

Mr. Thomas M. Raysor, with whom *Mr. Carlton L. Saunders* was on the brief, for appellees. *Mr. Paul B. Cromelin* also entered an appearance for appellees.

Before WASHINGTON, DANAHER and BURGER, Circuit Judges.

PER CURIAM: These are appeals from judgments of the District Court sustaining the validity of a deed and of a will, both documents having been executed by the decedent on the same day. The deed case was tried by the judge sitting without a jury; the will case was tried before a jury.

Plaintiffs-appellants complain of the exclusion in both cases of certain evidence. The affidavits of two doctors,

which were attached to a lunacy petition signed and filed by defendant-appellee Hodson with respect to the decedent, were excluded. But the substance of these affidavits was repeated in the petition itself, which was before the court and jury. Hence the affidavits would have added nothing to the record as admissions by Mrs. Hodson against her interest—the only purpose for which they were offered. Similarly, the exclusion of a hospital record containing a statement as to the decedent's physical and mental condition in 1953 and the early months of 1954, indicated by the hospital record as having been made orally to a hospital doctor by Mrs. Hodson, was not in our view prejudicial. Mrs. Hodson was called as an adverse witness by appellants, and an effort could have been made to elicit testimony from her on all of the matters recited in her purported statement; if her testimony was inconsistent with the statement, appropriate steps could have been taken to attempt to discredit her, as by calling the doctor. This was not done. In the circumstances, the exclusion of the affidavits and the hospital record, even if erroneous—points which we do not find it necessary to decide—does not appear to be "inconsistent with substantial justice." See Rule 61, FED.R.CIV.P. Reversal for a new trial is not warranted in either case because of the exclusion of this evidence.

In No. 13,202, the will case, we cannot say that the supplemental instructions to the jury, taken as a whole, adversely affected the substantial rights of the appellants.

The judgments of the District Court will accordingly be

Affirmed.